National Energy Board

Office national de l'énergie

Reasons for Decision

Enbridge Pipelines Inc.

RH-3-2008

April 2009

Tolls and Tariff

Canada

National Energy Board

Reasons for Decision

In the Matter of

Enbridge Pipelines Inc.

Application dated 14 December 2007 for the approval of tolls and tariffs for service on Line 9 under Part IV of the *National Energy Board Act*

RH-3-2008

April 2009

Cat No. NE22-1/2009-5E
ISBN 978-1-100-11980-9

This report is published separately in both official languages. This publication is available upon request in multiple formats.

Copies are available on request from:
The Publications Office
National Energy Board
444 Seventh Avenue S.W.
Calgary, Alberta, T2P 0X8
E-Mail: publications@neb-one.gc.ca
Fax: 403-292-5576
Phone: 403-299-3562
1-800-899-1265

For pick-up at the NEB office:
Library
Ground Floor

Printed in Canada

N° de cat. NE22-1/2009-5F
ISBN 978-1-100-90967-7

Ce rapport est publié séparément dans les deux langues officielles. On peut obtenir cette publication sur supports multiples, sur demande.

Demandes d'exemplaires :
Bureau des publications
Office national de l'énergie
444, Septième Avenue S.-O.
Calgary (Alberta) T2P 0X8
Courrier électronique : publications@neb-one.gc.ca
Fax : 403-292-5576
Téléphone : 403-299-3562
1-800-899-1265

Des exemplaires sont également disponibles à la bibliothèque de l'Office
(rez-de-chaussée)

Imprimé au Canada

Table of Contents

List of Figures

List of Appendices

Abbreviations and Glossary of Terms

Act	National Energy Board Act
b/d	barrels per day
Board or NEB	National Energy Board
CAPP	Canadian Association of Petroleum Producers
Clarkson Facilities	Facilities that are part of the Line 9 system that were previously used to provide westbound service to Petro-Canada's refinery in Oakville, Ontario
Committed Shipper	A qualified shipper that has executed a Transportation Service Agreement (TSA)
Committed tolls	Tolls payable by the Committed Shippers under the TSA
Enbridge or Applicant	Enbridge Pipelines Inc.
FSA	Facilities Service Agreement
GDPP	Gross Domestic Product Implicit Price Index
IPL	Interprovincial Pipe Line Inc. (former name of Enbridge Pipelines Inc.)
Imperial	Imperial Oil Limited
Initial Term	The first five years where the Transportation Service Agreement would be in effect (from 1 January 2008 to 31 December 2012)
Land Matters Consultation Initiative	A Board process open to all stakeholders as part of a review of landowner consultation program, acquiring access to right of way, vehicle crossings of right of way, pipeline abandonment, improving access to NEB processes.
Line 9	A pipeline on the Enbridge pipeline system that provides westbound service for offshore crude petroleum from Montreal, Quebec to Sarnia, Ontario
m^3/d	cubic metres per day
MNA	Master Netting Agreement
MOU	Memorandum of Understanding

Mainline or Older System	The Canadian oil pipeline owned by Enbridge that extends from Edmonton, Alberta to the Canada-U.S. Border near Gretna Manitoba
NOVA Chemicals	NOVA Chemicals (Canada) Ltd.
OH-2-97	National Energy Board Reasons for Decision, Interprovincial Pipe Line Inc. Facilities and Toll Methodology, December 1997
OPUAR	Oil Pipelines Uniform Accounting Regulations
Open Season	A process in which a company offers either existing or new capacity on its pipeline and receives offers of commitment for some or all of that capacity.
RH-3-2004	National Energy Board Reasons for Decision, TransCanada Pipelines Limited North Bay Junction Application, December 2004
RH-2-2007	Hearing Order issued to consider Enbridge application for tolls on Line 9 dated 11 April 2007; the application was subsequently withdrawn
Re-reversal of Line 9	A proposed project to reverse Line 9 from its current westbound flow to an eastbound flow
Rule 19	Financial Assurances section of the Line 9 Offshore Petroleum Rules and Regulations Tariff
Southern Lights Pipeline	Reversal of Enbridge's Line 13 for the transportation of condensate (diluent) from Gretna, Manitoba to Edmonton, Alberta (RH-3-2007)
Suncor	Suncor Energy Marketing Inc.
TSA	Transportation Service Agreement
Take-or-pay	Payment is required for contracted volumes whether or not those volumes are shipped
Termination Payment	The increase in a terminating shipper's tolls for the final contract year to cover the terminating shipper(s) proportionate share of the debt portion of the outstanding rate base remaining at the beginning of the final contract year

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the regulations made thereunder; and

IN THE MATTER OF an application dated 14 December 2007 by Enbridge Pipelines Inc. pursuant to Part IV of the Act for the approval of tolls and tariffs for transportation service on Line 9, filed with the National Energy Board under File No. OF-Tolls-Group1-E101-2007-04 01; and

AND IN THE MATTER OF National Energy Board Hearing Order RH-3-2008 dated 26 March 2008, as amended;

HEARD in Calgary, Alberta on 6, 7, 8, 9 and 12 January 2009;

BEFORE:

G.A. Habib	Presiding Member
R.R. George	Member
K.M. Bateman	Member

Appearances	**Participants**	**Witnesses**
Applicant		
J.H. Farrell H. Long M. Yohemas	Enbridge Pipelines Inc.	G. Tannas L. Varsányi R. Fischer P. Douvris
Companies		
D.P. Langen	Imperial Oil Limited	P. Ingle A. Lehar
G. Nettleton M. Keen	NOVA Chemicals (Canada) Limited	L. MacDonald W. Mirosh N. Jamani C. McDougall G. Engbloom
D. Armstrong	Suncor Energy Marketing Inc.	
M.A. Fowke	National Energy Board	

Chapter 1

Introduction

1.1 Application

On 14 December 2007, Enbridge Pipelines Inc. (Enbridge or the Applicant) applied to the National Energy Board (NEB or Board) for new tolls and tariffs for transportation service on Line 9 effective 1 January 2008 (the Application). Enbridge requested the Board issue an order approving the tolls and tariffs for service on Line 9, on an interim basis effective 1 January 2008. Enbridge also requested the Board issue an order approving such tolls and tariffs on a final basis, and in particular, an order approving the following:

(a) Enbridge's proposed Line 9 Toll Principles as prescribed by the Transportation Service Agreement (TSA) and the resultant tolls;

(b) Enbridge's proposed Offshore Crude Petroleum Tariff (NEB No. 279) and the Tolls Tariff (NEB No. 280 as amended);

(c) An exemption from filing Financial Surveillance Reports including, but not limited to, quarterly surveillance reports, year end reports and performance measures insofar as Line 9 is concerned;

(d) An exemption from the requirement to keep a system of accounts in the manner prescribed by the *Oil Pipeline Uniform Accounting Regulations*;

(e) Enbridge's proposed deferral account for oil loss costs; and

(f) Other relief as Enbridge may request or the Board may deem appropriate pursuant to section 20 of the *National Energy Board Act* (Act).

On 20 December 2007, the Board issued a letter requesting comments from interested persons on the issues that should be considered by the Board relevant to the application and the appropriate process for considering the application. The Board also made the applied-for tolls interim. Comments were received from Imperial Oil Limited (Imperial) who supported the application; and from NOVA Chemicals (Canada) Ltd. (NOVA Chemicals) and the Ontario Pipeline Landowner Association (OPLA) who did not. Enbridge provided reply comments on 18 January 2008.

On 7 February 2008, the Board issued a letter advising that issues pertaining to pipeline abandonment or terminal negative salvage (TNS) raised by OPLA would be more appropriately dealt with as part of the Land Matters Consultation Initiative and would not be included in the Board's consideration of the Line 9 application. The Board noted that NOVA Chemicals identified issues relating to the open season process, financial assurances and tolling methodology.

On 26 March 2008, the Board issued Hearing Order RH-3-2008, setting the Application down for an oral public hearing to commence on 18 June 2008.

By letter dated 16 May 2008 the Board approved Enbridge's 15 May 2008 request, which was agreed to by Imperial and NOVA Chemicals, for suspension of the procedural schedule pending the outcome of negotiations amongst these parties to resolve NOVA Chemicals' concerns as related to the Application. The Board also advised that it would issue further correspondence with respect to the process for the Application after communication was received from Enbridge.

Enbridge filed a letter dated 26 June 2008 indicating that negotiations failed to resolve NOVA Chemicals' concerns. By letter dated 25 July 2008 the Board recommenced the hearing process, setting out new deadlines for the remainder of the pre-hearing steps and setting a hearing date of 6 January 2009.

1.2 Background

Origin of Line 9

Line 9, previously known as the Montreal Extension, was initially constructed by Interprovincial Pipe Line Limited (IPL), the former corporate name of Enbridge Pipelines Inc. It provided eastbound service from Sarnia, Ontario to Montreal, Quebec to provide Montreal refineries with crude oil produced in western Canada.

Reversal Project

In 1995, IPL, Imperial, NOVA Chemicals, Petro-Canada, Shell Canada Limited (Shell), and Suncor Energy (Suncor) initiated a project to reverse the direction of flow on the Montreal Extension to provide westbound service for offshore crude petroleum to the five refiners in Ontario. The reversal project was also supported by the Canadian Association of Petroleum Producers (CAPP).

The reversal project included the transfer of the Clarkson Facilities to Line 9 from the Older System and the short pipeline connecting North Westover Station to the Westover Terminal. Modifications to all of these facilities were also required for reversal purposes.

On 1 May 1997, IPL applied to the Board for an order approving the reversal with a capacity of 38 160 m^3/d (240,000 b/d). The Board approved the reversal project with certain modifications in its OH-2-97 Reasons for Decision[1].

---

1 National Energy Board, OH-2-97, Reasons for Decision, Interprovincial Pipe Line Inc. Facilities and Toll Methodology, December 1997

Facilities Support Agreement

IPL entered into a Facilities Service Agreement (FSA) with the shippers on Line 9, under which they provided the requisite financial support for the reversal project to proceed. Line 9 shippers agreed, among other things, to support certain financial aspects of the operation of Line 9 during the first five years after the reversal project was completed. The FSA was subdivided into a Primary Term (1 October 1999 through 30 September 2004) and an Extended Term (1 October 2004 through 30 September 2007), and, as provided in the agreement, the tolls for Line 9 were designed on a stand-alone basis instead of being rolled-in to the Mainline tolls.

RH-2-2007

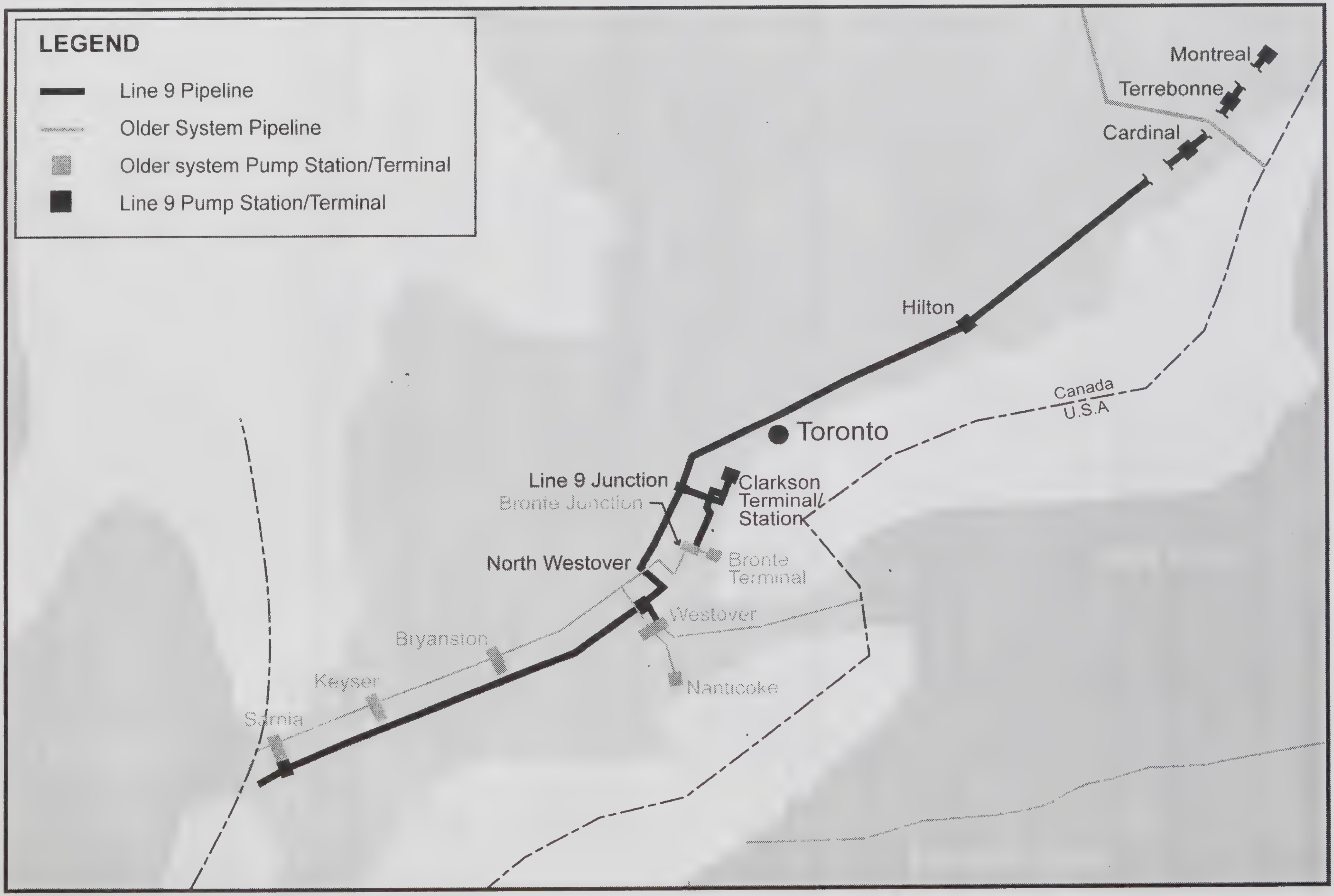
Prior to the conclusion of the Extended Term of the FSA, by application dated 11 April 2007, Enbridge applied to the Board for the approval of new tolls and tariffs for service on Line 9. The application included a request to increase the depreciation rates for the Line 9 assets to reflect the estimated remaining life of Line 9 in westbound service; namely 7.75 years from 1 April 2006 to 31 December 2012.

By letter dated 27 April 2007, the Board issued Hearing Order RH-2-2007 with the following issues identified for discussion in the proceeding:

1. The appropriateness of the proposed Rate Base, Revenue Requirement and components thereof for the 2006 Test Period (1 April 2006 through 31 December 2006) and the 2007 Test Year (1 January 2007 through 31 December 2007).
2. The appropriateness of the proposed changes to depreciation expenses, including the reasonableness of the related depreciation study and the economic life assumptions.
3. Whether and to what extent Terminal Negative Salvage costs should be collected by the Applicant.
4. The appropriateness of the proposed Capital Structure, Cost of Debt and Return on Equity for Line 9.
5. The appropriateness of establishing the proposed deferral accounts.

By letter dated 12 September 2007, Enbridge withdrew its application stating that recent events made the application unnecessary. Enbridge indicated that it would begin work on an application for 2008 tolls.

Figure 1-1
Line 9 Pipeline



Chapter 2

Open Season

Following the expiry of the Primary Term of the FSA, Enbridge and the Line 9 shippers sought to negotiate a settlement whereby Line 9 would continue in westbound service on a long-term basis. These negotiations were unsuccessful, leading to the RH-2-2007 proceeding.

In September 2007, Imperial met with Enbridge to present a draft term sheet as the starting point for another round of negotiations for a long-term settlement. It was decided by both parties to negotiate on a bilateral basis because prior multilateral negotiations had failed.

The term sheet, when finalized by the two parties, outlined the terms and conditions for a new TSA for westbound service on Line 9. Imperial committed to ship a sufficient monthly volume on a take-or-pay basis that would allow Enbridge to recover its full revenue requirement for Line 9 over a term of at least five years. In exchange, Enbridge agreed to withdraw the RH-2-2007 application and conduct an open season for westbound service on Line 9.

In October 2007, a Memorandum of Understanding (MOU) was executed between Enbridge and Imperial. The MOU contained clauses that were not outlined in the TSA, including Article 4.4.3 which was an agreement to begin a study to determine the potential, timing, and most optimal way to utilize Enbridge facilities in Ontario, including the re-reversal of Line 9 to flow in a west-to-east direction. This clause also contained an agreement to conduct further discussions about the possibility of transferring the remaining rate base associated with the Clarkson Facilities to the Older System rate base.

Through the Open Season, Enbridge provided prospective shippers with the opportunity, subject to regulatory approval, to subscribe for transportation service of up to 28 600 m^3/d (180,000 b/d) of capacity on Line 9, leaving 9 500 m^3/d (60,000 b/d) available for uncommitted shippers. Prospective shippers that executed a TSA as a result of the Open Season would commit to pay the applicable committed tolls on a take-or-pay basis during the term of the TSA. The Open Season to solicit shipper commitments was conducted between 15 October and 16 November 2007.

Prior to the close of the Open Season, Imperial and NOVA Chemicals each completed and returned to Enbridge two copies of the TSA on 6 November and 16 November respectively. Enbridge accepted Imperial's signed TSA but it did not accept the signed TSA of NOVA Chemicals as NOVA Chemicals did not meet Enbridge's credit requirements. NOVA Chemicals was accordingly not eligible for service as a Committed Shipper.

As a result of the Open Season, Imperial signed the TSA for committed volumes totaling 15 900 m^3/d (100,000 b/d) representing 42 per cent of the total estimated Line 9 capacity of 38 157 m^3/d (240,000 b/d).

Views of Enbridge

In Enbridge's view, the terms and conditions of the Open Season as well as its conduct before, during, and after the Open Season were appropriate. Enbridge provided a copy of the TSA as proposed in a *pro forma* version, to NOVA Chemicals, Petro-Canada, Shell, and Suncor before commencing the Open Season in mid-October 2007. Enbridge subsequently met with all parties, including meeting twice with NOVA Chemicals, to obtain comments on the terms and conditions of the TSA.

With respect to the MOU with Imperial, Enbridge stated that Article 4.4.3 was not included in the TSA or the Open Season documents because it was an undertaking between Enbridge and Imperial to study the potential to re-reverse Line 9 and not a commitment to re-reverse the line. Enbridge acknowledged that other shippers may have been interested in this study but stated that it is engaged in many studies in the ordinary course of its business.

Enbridge also claimed that the agreement to conduct further discussions about transferring the rate base associated with the Clarkson Facilities to the Older System was not included in the TSA since it was irrelevant to the toll design or any other provisions dealing with the determination of committed and uncommitted tolls.

Enbridge indicated that NOVA Chemicals requested three substantive revisions to the TSA involving the definition of "Actual Shipments", an annual instead of a monthly deficiency volume, and a fixed volume for make-up purposes. Enbridge accepted two of the three requests.

Enbridge also submitted that NOVA Chemicals took issue with Enbridge's credit requirements for Line 9 three days prior to the close of the Open Season. Enbridge claimed that a prudent shipper would have known that if it could not meet Enbridge's credit requirements, it would have to satisfy the financial assurances set out in the TSA. The notice of Open Season stated that to be accepted as a Committed Shipper, a prospective shipper must provide evidence of, and maintain an investment grade credit rating throughout the term of the TSA. Alternatively, a prospective shipper must provide a guarantee acceptable to Enbridge from a publicly-rated investment grade entity. The notice of Open Season further indicated that, at the sole discretion of Enbridge and based on information provided by the prospective shipper, equivalent or alternative assurances of creditworthiness could be accepted. Enbridge also stated that the Open Season package clearly indicated that, for a letter of credit, the phrase "all costs and charges that could reasonably accrue due to Carrier" meant a letter of credit in an amount sufficient to secure a Committed Shipper's financial obligations for at least five years assuming no prior re-reversal of Line 9.

Enbridge later confirmed that there was no single statement in the Open Season package that indicated that five years of financial assurances would be necessary and a careful reading of the Notice of Open Season together with the rules in the Offshore Crude Petroleum Rules & Regulations Tariff was required to be aware of the specific financial assurance requirements. Nevertheless, NOVA Chemicals completed and returned two copies of the TSA to Enbridge on the last day of the Open Season. Enbridge also stated that in the 30 days following the Open Season, it worked with NOVA Chemicals to find a solution so that NOVA Chemicals could have Committed Shipper status despite its credit rating being below investment grade.

Enbridge indicated that in order for any party to become a Committed Shipper following the close of the Open Season a new open season would have to be held. Enbridge went further to say that if NOVA Chemicals requested a new open season it would consider the request at that time. In addition, Enbridge stated that given the current toll structure, it would also be necessary to consult with Imperial. Further, that additional committed volumes would result in it earning more than it was seeking in the TSA, necessitating a recalculation of the committed toll which in turn would impact Imperial, the only Committed Shipper. In Enbridge's view, having to consult with Imperial does not mean that Imperial would have veto power as to whether an additional open season would be conducted.

Views of Imperial

As the largest shipper on Enbridge's Line 9 Imperial submitted that, given the failure of the multilateral negotiations and time constraints, it participated in bilateral negotiations with Enbridge in September 2007 as it anticipated that it could negotiate a commercial arrangement that would be acceptable to other shippers, including NOVA Chemicals. At the conclusion of the negotiations, Imperial believed that NOVA Chemicals would participate in the Open Season and would execute a TSA, which NOVA Chemicals did.

In Imperial's view, the MOU between Enbridge and Imperial was a privileged and confidential document which was not known to other parties involved in the Open Season. Imperial stated that the intent of the MOU was to make sure that, as the majority Committed Shipper, it would be able to influence the timing of working with Enbridge on a proposal to re-reverse Line 9. Imperial knew through earlier discussions with NOVA Chemicals that there were different points of view and different aspects to the needs and issues associated with the re-reversal and therefore, Imperial sought to ensure that it had the ability to work with Enbridge on this issue. Imperial further submitted that NOVA Chemicals' implication of an attempt by Imperial to disadvantage NOVA Chemicals was not supported in any way by the evidence.

Imperial expressed the view that, if additional committed volumes were to be committed to Line 9, Imperial would need to participate in any such discussions. In its view the contractual arrangements as per the TSA could not be amended or changed without mutual consent of Imperial and Enbridge.

Imperial stated that the Board should focus on the fact that Enbridge held an Open Season providing all potential shippers an equal opportunity to contract as Committed Shippers on similar terms and conditions. Imperial further stated that when Enbridge met with NOVA Chemicals in advance of the Open Season, NOVA Chemicals and Enbridge negotiated substantive changes to the *pro forma* version that were incorporated into the TSA and ultimately used in the Open Season.

Views of NOVA Chemicals

In NOVA Chemicals' view, the Open Season process was flawed. NOVA Chemicals submitted that there was not full disclosure of the MOU provisions. It stated that the disclosure of Article 4.4.3 was required to provide consistency with the principles of ensuring open and transparent information through the Open Season exercise. The clause was relevant and material to NOVA Chemicals' interests, particularly in its review and consideration to make the commitment to enter into the long-term TSA given NOVA Chemicals' opposition to the re-reversal of Line 9. It further added that the study was material to, and would affect, the termination rights set out in the TSA. NOVA Chemicals also stated that given the toll design, the transfer of the remaining rate base associated with the Clarkson Facilities to the Older System rate base would affect tolls. According to NOVA Chemicals, no reasons were given as to why this information was withheld.

NOVA Chemicals submitted that it was precluded from participating in all processes leading up to the development of the Open Season. It stated that it did not understand why bilateral negotiations of the TSA occurred prior to the Open Season process and excluded the only other party known with certainty to Enbridge to have a vested interest in continuing to ship on Line 9 in east-to-west service on a long-term basis. NOVA Chemicals further stated that Enbridge did not act in accordance with the Board's guiding principles as they relate to conducting open seasons. Enbridge breached the Board's objective of ensuring open and transparent exchanges of information to ensure access was provided on a fair and equitable basis with no unjust discrimination in services and tolls. In NOVA Chemicals' view Enbridge could have consulted it in the course of the development of the TSA.

According to Nova Chemicals, the Open Season did not adequately disclose the prerequisites to service; namely, the financial assurance requirements. It submitted that, during the final stages of the Open Season process, Enbridge broadened the prerequisites to receiving services by requesting additional financial assurances before accepting NOVA Chemicals' request for Committed Shipper status. The last minute imposition of the letter of credit covering the full five-year term as a condition of NOVA Chemicals obtaining Committed Shipper status, is a clear indication that Enbridge did not conduct a just and reasonable Open Season.

NOVA Chemicals stated that the Application was fundamentally flawed and resulted in a violation of the guiding principles of open access and transparency. It cited the RH-3-2004 Reasons for Decision where the Board reiterated the principle related to open access and transparency.

> shippers are to know in advance of negotiations the terms and conditions of access to a pipeline. This ensures transparency and puts the pipeline and its customers on an equal footing in negotiating a business arrangement.[2]

NOVA Chemicals also noted that there was no provision in the TSA to have another open season during the course of the first five years. NOVA Chemicals submitted that this was unusual as

---

2 National Energy Board RH-3-2004, Reasons for Decision, TransCanada PipeLines Limited North Bay Junction Application, December 2004 at p. 9

most pipelines would want to have more committed volumes than less and, therefore, should be amenable to having further open seasons.

Views of the Board

While the Board does not prescribe guidelines governing the Open Season process, it expects that applicants conducting open seasons will consult with all interested parties in a transparent and fair manner. It is the Board's view that parties are not precluded from bilateral negotiations as there may be circumstances when this type of negotiation is appropriate. However in this instance, the Board is of the view that since NOVA Chemicals is the only other party known with certainty to Enbridge to have a vested interest in continuing to ship on Line 9 in east-to-west service on a long-term basis, Enbridge should have provided NOVA Chemicals with the opportunity to more fully participate in the development of the TSA. NOVA Chemicals had little substantive input to the TSA given that the terms and conditions of the TSA were agreed upon between Imperial and Enbridge prior to delivery to NOVA Chemicals and any changes would need to be discussed with Imperial.

The Board notes that certain items of the MOU signed between Imperial and Enbridge were not reflected in the TSA and may have had important commercial implications for NOVA Chemicals. More specifically, these include the agreement between Enbridge and Imperial to begin a study to determine the potential, timing and the most optimal way to utilize Enbridge facilities to ensure deliveries to Ontario, including the re-reversal of Line 9 to flow in a west-to-east direction as well as the agreement to conduct further discussions concerning the transfer of the remaining rate base associated with the Clarkson Facilities to the Older System. The Board finds that by Enbridge not disclosing some of the articles in the MOU that were commercially sensitive to NOVA Chemical's operations and not allowing for NOVA Chemical's input, NOVA Chemicals may have been disadvantaged relative to Imperial, the only other shipper on Line 9. Furthermore, the Board notes that during the hearing it was demonstrated that the financial assurances were not clearly identified in the TSA and the Open Season documents.

Therefore the Board finds that the discussions prior to the Open Season should have included NOVA Chemicals, particularly as there are only two shippers on the pipeline. In addition, the subsequent TSA and Open Season documents should have been clearer with respect to the financial assurance requirements and any potential future plans for the pipeline which could have significant commercial impacts on NOVA Chemicals.

Chapter 3

Transportation Service Agreement

Pursuant to Enbridge's application, the TSA took effect 1 January 2008, on an interim basis. Subject to the Board approving this application, the TSA would remain in effect until at least 31 December 2012. This period of five years from 1 January 2008 to 31 December 2012 is referred to as the Initial Term.

The toll design of the TSA makes it similar to a take-or-pay contract. By executing the TSA, a prospective Committed Shipper agrees to pay the committed tolls for the first five years of the agreement. In the event of termination, a Committed Shipper would be obligated to pay its proportionate share of the debt portion of the outstanding rate base plus the tax allowance associated with this debt portion (the Termination Payment).

The initial committed tolls, defined as the committed tolls for the first year of the Initial Term, would be determined by dividing the revenue requirement of Line 9 by the total committed volumes. These initial committed tolls would then escalate by 75 per cent of the Gross Domestic Product Implicit Price Index (GDPP) for subsequent years of the Initial Term. Only once every five years, but not earlier than the end of the Initial Term, either Enbridge or a Committed Shipper could request a recalculation of committed tolls on a cost-of-service basis which would result in re-based tolls. These re-based tolls would also escalate by 75 per cent of the GDPP on a yearly basis. The initial committed tolls and any re-based tolls would be based on a 25-year depreciation period and a capital structure of 55 per cent debt and 45 per cent equity.

The uncommitted tolls would be 20 per cent higher than the committed tolls. There would also be a revenue-sharing mechanism whereby 100 per cent of the uncommitted toll revenue less incremental power costs, the net excess revenue, would be returned to Committed Shippers up to throughput amounts of 28 600 m^3/d (180,000 b/d). On amounts greater than 28 600 m^3/d (180,000 b/d), Enbridge would receive 50 per cent of net excess revenue and the Committed Shippers would receive the other 50 per cent.

Also included in the TSA is a provision to the effect that if the Committed Shippers, by majority volume-weighted vote, and Enbridge agree to re-reverse Line 9 and if the Board approves rolling the Line 9 rate base into Enbridge's Older System toll, then the obligations of the Committed Shippers under the TSA would terminate. If rolled-in tolls were not secured for the re-reversal, then the Committed Shippers, by majority volume-weighted vote, would have the option to cancel the TSA or enter into a separate agreement.

Views of Enbridge

Enbridge indicated that the prospective Committed Shippers on Line 9 wanted toll certainty for at least five years for their committed and uncommitted volumes. Enbridge was willing to provide toll certainty in exchange for other provisions of the TSA that would provide it with an overall favorable outcome. Enbridge stated that the TSA enabled it to mitigate the volume risk it was facing on Line 9, but noted that it would retain the risk associated with the recovery of the equity portion of the rate base. Enbridge submitted that since the tolls could only be re-based once every five years, the terms of the TSA would preclude Enbridge from adjusting its revenue requirement on an annual basis.

In agreeing to the TSA, Enbridge was prepared to make a five-year commitment to provide firm transportation service and in return required a five-year commitment from Committed Shippers to utilize the service on a take-or-pay basis. Enbridge noted that it was (and still is) a creditworthy party and, therefore, required a creditworthy counterparty to execute a TSA. According to the provisions of the TSA, Enbridge took on the risk that a Committed Shipper might default because no one else was prepared to do so and therefore employed credit requirements to mitigate the default risk. As a result, Enbridge expressed the opinion at the outset that it must satisfy itself that a Committed Shipper has the financial strength to support the commitment it is making for the entire term of the TSA. In pursuing this goal, credit qualifications and Rule 19, which deals with financial assurances, were included by Enbridge in the notice of Open Season and the tariff, respectively.

As stated in the notice of Open Season, in order to be accepted as a Committed Shipper, a prospective shipper must provide evidence of, and would be required by Enbridge during the term of the TSA to maintain an investment grade credit rating or a guarantee acceptable to Enbridge from a publicly rated investment grade entity. The notice of Open Season further indicated that at the sole discretion of Enbridge and based on information provided by the prospective shipper, equivalent or alternative assurances of creditworthiness could be accepted. Such equivalent or alternative assurances of credit worthiness were listed in Rule 19 as being a prepayment, a letter of credit or a guarantee in an amount sufficient to ensure payment of all costs that could reasonably accrue to Enbridge, or other enforceable collateral security.

Enbridge indicated that since NOVA Chemicals or its parent company, Nova Chemicals Corporation, did not have an investment-grade credit rating, only a letter of credit equal to the toll obligation over the initial five-year term of the TSA would be accepted as an alternative assurance of credit worthiness. It was submitted by Enbridge that requiring a letter of credit from NOVA Chemicals was reasonable and not an improper exercise of its discretion.

If an FSA-style toll design with allowed revenue true-ups was adopted, Enbridge stated that it would have inherited the business risk of no long-term commitments on Line 9 and other Committed Shippers would have inherited the default risk of non-creditworthy shippers. Enbridge indicated that in such a scenario, there would likely be no Committed Shippers. Enbridge suggested that if the TSA allowed annual true-ups of the revenue requirement and that, in the event of a default by a Committed Shipper, the remaining Committed Shippers were required to pay for the total revenue requirement, there would be no need for NOVA Chemicals to post a letter of credit equal to the toll obligations accrued during the initial term of the TSA.

Enbridge stated that the purpose of the revenue-sharing mechanism was to reimburse Committed Shippers because, in effect, the Committed Shippers would pay 100 per cent of the estimated revenue requirement. In addition, the mechanism provides an incentive to become a Committed Shipper. To the extent uncommitted revenue is received, the net excess revenue is then returned to the Committed Shippers so that the carrier does not receive revenue in excess of its estimated revenue requirement. Enbridge estimated the net excess revenue to be reimbursed to Imperial for 2008 to be $18.5 million based on the interim toll methodology. If there was a concern about the revenue-sharing mechanism with respect to section 69 of the Act[3], Enbridge submitted it would revise the tariff to add the revenue-sharing provisions of the TSA.

As submitted by Enbridge, the 20 per cent premium over committed tolls to transport any uncommitted volumes was used to encourage shippers to make a financial commitment to Line 9 by signing a TSA as a Committed Shipper. According to Enbridge, the rationale for the premium was that without it Uncommitted Shippers would receive the benefits of a Committed Shipper without assuming any of the risk. Further, Enbridge submitted that the 20 per cent premium would be well within the zone of reasonableness, and comparable to other pipelines' use of premiums, such as Express Pipeline which charges 24 per cent. Finally, had Enbridge accepted NOVA Chemicals as a Committed Shipper, the toll design for both the committed and uncommitted service would have been acceptable from NOVA Chemicals perspective as there was no suggestion from NOVA Chemicals at that time that the 20 per cent premium was a risk compensation mechanism.

Enbridge's view of article 4.4.3 of the TSA which addressed the re-reversal of Line 9, was that it would be an escape clause or an off-ramp to exit the TSA for Committed Shippers in the event Line 9 was re-reversed. According to Enbridge, this article would address the situation where a Committed Shipper would be held to a contract that forced the shipper to pay the debt portion of Line 9. Enbridge noted that while Imperial required the provision in order for the term sheet to be agreed upon, Imperial would not have sole discretion on the decision to re-reverse Line 9.

Views of Imperial

Imperial stated that it was looking for toll certainty when it negotiated the TSA with Enbridge. As well, it wished to avoid accelerated depreciation, as this would result in an increase in Line 9 tolls as was applied for by Enbridge in the RH-2-2007 proceeding. The non-rebasing period of the TSA, as submitted by Imperial, would provide some certainty with respect to tolls because the five-year committed tolls could not be recalculated on a cost-of-service basis. Imperial also stated that this non-rebasing period would allow sufficient lead time for the development, engineering and construction of new facilities that might be required for refining facilities to use different feedstock.

---

3 69.(1) A company or shipper or an officer or an employee, or an agent or a mandatary, of the company or shipper who

(*a*) offers, grants, gives, solicits, accepts or receives a rebate, concession or discrimination, or

(*b*) knowingly is party or privy to a false billing, false classification, false report or other device,whereby a person obtains transmission of hydrocarbons or any other commodity by a company at a less rate than that named in the tariffs then in force, is guilty of an offence punishable on summary conviction.

According to Imperial, a Committed Shipper on Line 9 would become an Enbridge debtor the instant Enbridge accepted an executed TSA from that shipper and would be indebted to Enbridge for its entire take-or-pay obligation over the five-year term of the TSA. Imperial submitted that, given the unique circumstances of Line 9, if the toll design was altered so as to place volume and default risk onto shippers via a cost-of-service toll methodology, it would transfer all of those risks to the remaining Committed Shippers. In this case, the toll design would transfer the risks to Imperial. Imperial argued that the Board had found in the past that if a pipeline failed to assess the risks and to obtain the requisite financial assurance requirements from shippers under a cost-of-service toll methodology, it would not be able to recover shipper default costs in its revenue requirement. Imperial further stated that the Board should not draw a distinction between a take-or-pay toll design and a cost-of-service toll design. The Board should consider whether Enbridge, in exercising its judgment and discretion by asking for a five-year letter of credit of NOVA Chemicals, has acted prudently since, according to Imperial, this would ultimately be the measure the pipeline would be held to in the case of shipper default.

Dr. Lehar, Imperial's expert witness, stated that NOVA Chemicals and its parent company would be a significant credit risk for Enbridge. Financial markets have assigned an increasing implied probability over the term of the TSA that NOVA Chemicals' parent could default on its senior debt. The probability of default increases to almost 69 per cent in the final year of the TSA. Imperial argued that these are significant probabilities which have more than doubled in the last four months.

In Imperial's view, Enbridge has acted prudently in exercising its judgment and discretion in requesting the financial assurance requirements from NOVA Chemicals to ensure that Committed Shippers on Line 9 have the financial wherewithal to meet their toll obligations under the TSA. Imperial suggested that Enbridge's approach to address financial risk through financial assurance requirements would prevent shippers of high credit worthiness from subsidizing less credit worthy shippers through equivalent tolls. To that effect, Imperial submitted that it would be discriminatory to argue that Imperial would not be worse off if NOVA Chemicals were to default. According to Imperial, such an argument ignores the fact that Imperial made a significant capacity commitment which enables continued service on Line 9. Conversely, NOVA Chemicals would actually be worse off if it were Imperial who was to default because the tolls would become prohibitive for NOVA Chemicals given their relatively low volume commitment.

According to Imperial, the revenue-sharing mechanism meets the requirements of the Act, including section 69, and should be approved as filed. Imperial submitted that the 20 per cent premium on uncommitted volumes is appropriate, just and reasonable.

In executing a TSA, Imperial was concerned that it would be the last company shipping on Line 9 and end up having to absorb the debt portion of Line 9. To mitigate this risk, Imperial wanted to be ready to react at the right time if market circumstances change such that a re-reversal of Line 9 could become a viable option to move crude from Western Canada to markets. Imperial submitted that the intent of the majority-weighted vote in the TSA's article with respect to the re-reversal of Line 9 was to make sure that, as the majority Committed Shipper, Imperial would be able to influence the timing of working with Enbridge on the proposal to re-reverse Line 9.

Views of NOVA Chemicals

NOVA Chemicals operates a petrochemical facility in Corunna, Ontario which is described as a flexicracker that produces ethylene and associated co-products. This facility, according to NOVA Chemicals, is competitive on a global basis and serves a number of customers in the Sarnia area that rely almost exclusively on the feedstock provided by the Corunna operations. Approximately 75 to 90 per cent of the Corunna facility's light sweet crude and condensate feedstock requirements are transported on Line 9, making Line 9 the primary means to supply the Corunna facility. In 2007 a $350 million modernization of this facility was completed to ensure its global competitiveness in the long term. It was suggested by NOVA Chemicals that the continued success of the Corunna facility was dependent upon accessing feedstock supply through the use of open-access rate-regulated crude oil pipelines.

NOVA Chemicals was of the opinion that the applied-for toll design was imprudent, unreasonable and unjustly discriminatory since it denied NOVA Chemicals reasonable access to committed shipper service through the imposition of unreasonable and unprecedented levels of financial assurance requirements. NOVA Chemicals submitted that these requirements were the result of a service that has been negotiated between two dominant players; the regulated utility and its major shipper. According to NOVA Chemicals the denial of such access and the operation of the applied-for revenue-sharing mechanism would result in an unjust and unduly preferential credit of uncommitted revenue to the only Committed Shipper, Imperial. The combined effect of these two points would further mean that the applied-for toll design creates potential anti-competitive outcomes.

According to NOVA Chemicals' expert witness, Mr. Engbloom, the five-year non-rebasing period places higher risk onto Enbridge. He stated that in the event of any revenue shortfall arising from a Committed Shipper failing to pay its tolls Enbridge would have to bear the entire shortfall. For this reason Enbridge is forced to seek very high security from every Committed Shipper over the Initial Term of the TSA. Mr. Engbloom expressed the view that a reasonable and accepted utility practice in Canada is that tolls are established each year as a function of the committed volumes in that year. This process exposes the pipeline to less risk of default and results in lower tolls for shippers through a lower cost of capital.

It was submitted by NOVA Chemicals that a toll design similar to the FSA should be adopted by Enbridge for Line 9. Such a toll design would include a true-up mechanism for revenue requirements and the ability to make changes in committed volumes, both with the result that tolls could adjust periodically. This would provide a balance between a reasonable opportunity for the utility to recover its revenue requirement and a reasonable opportunity for customers to receive service without onerous conditions.

As argued by NOVA Chemicals, the toll certainty sought by Imperial was irrelevant to this proceeding as toll certainty did not exist in a quantitative sense since the GDPP and volumes to be shipped on Line 9 in any given year were unknown. According to NOVA Chemicals, as long as NOVA Chemicals shipped on Line 9 and paid its toll, Imperial would be better off than Imperial's stated worst case, which was paying the entire revenue requirement.

NOVA Chemicals recognized that it was not an investment grade company. However, in terms of financial assurances, NOVA Chemicals indicated that it was prepared to leave the current parental guarantee and the Master Netting Agreement (MNA) in place, and allow Enbridge to register a lien on the inventory that would be in its physical possession. In the instances where the amount of inventory in Enbridge's physical possession would not be adequate to cover the obligations under the remaining five years of the contract, this shortfall would be supplemented with a letter of credit for those brief periods to satisfy Enbridge's increased credit risk. Further, NOVA Chemicals was of the opinion that the financial assurances, requested by Enbridge and resulting from the applied-for toll design, were unreasonable and unprecedented. The five-year letter of credit totaling $33.2 million would cost NOVA Chemicals approximately $1 million per year. NOVA Chemicals advised that a letter of credit is a commitment of the present capital available and would reduce its current liquidity. It argued that it has been denied access to the service with the lowest toll due to the unprecedented financial assurance requirements.

It was NOVA Chemicals' position that the revenue-sharing mechanism constitutes a rebate and contravenes section 69 of the Act which prohibits rebates. NOVA Chemicals submitted that the revenue-sharing mechanism would result in an unjust and unduly preferential credit of uncommitted toll revenue to the only Committed Shipper. Mr. Engbloom submitted that under the applied-for revenue-sharing mechanism, every shipper other than Imperial is treated as a discretionary shipper generating discretionary revenue. He argued that NOVA Chemicals is essentially a captive shipper on Line 9 and its crude oil shipments are not discretionary. NOVA Chemicals submitted that if the uncommitted toll revenue was credited to the revenue requirement it would lower both committed and uncommitted tolls and the Uncommitted Shipper would see some benefit. It was further submitted by NOVA Chemicals that the result of the revenue-sharing mechanism is that NOVA Chemicals would be subsidizing Line 9 volumes of Imperial. NOVA Chemicals stated that it and Imperial were in competition with respect to refining and petrochemical products in the Sarnia Valley and this would create the potential for anti-competitive outcomes. According to NOVA Chemicals, tolls should not be designed with such consequences as this ran contrary to the principle that tolls must be equal for traffic of similar description carried over the same route. Therefore, NOVA Chemicals stated that the proposed toll design contravened sections 62[4] and 67[5] of the Act.

NOVA Chemicals was interested in shipping both committed and uncommitted volumes on Line 9 and therefore accepted that a higher Uncommitted Shipper toll was intended to induce prospective shippers to commit for the five-year term of the TSA. NOVA Chemicals did not accept that the higher Uncommitted Shipper toll was intended to penalize a shipper who was willing to sign a TSA but was not willing to accept the letter of credit requirements. NOVA Chemicals stated that it found the 20 per cent premium unduly discriminatory since, in its view, a premium should not be used to deal with credit issues. It was submitted by NOVA Chemicals that the 20 per cent premium was reasonable for the reasons Enbridge had stated but in the circumstances of this case it was being used as a risk compensation mechanism that operated under an imprudent toll design. NOVA Chemicals was of the view that operation of the

---

4 62. All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

5 67. A company shall not make any unjust discrimination in tolls, service or facilities against any person or locality.

premium in this manner was unjust and unreasonable and, accordingly, was in breach of section 62 of the Act.

In light of the unreasonable toll design of the TSA and the lack of consultation with NOVA Chemicals by Enbridge, NOVA Chemicals asked the Board to reject the TSA because, in this case, the pursuit of a negotiated deal went too far.

Views of the Board

The Board is of the view that the TSA is the result of bilateral negotiations between Enbridge and Imperial despite the fact that Enbridge made some modifications to the pro-forma TSA following NOVA Chemicals' comments. The resulting toll design of the TSA has been assessed by the Board in the context of, among other things, NOVA Chemicals being essentially a captive shipper on the system since its primary source of feedstock for its Corunna facility is Line 9. Further, NOVA Chemicals has been a long-term customer of Enbridge in the past and plans to be one in the future

The five-year non-rebasing period, in the Board's view, gives rise to Enbridge's need for the requested financial assurances of NOVA Chemicals since neither NOVA Chemicals nor its parent have an investment grade credit rating. While the Board does not provide a view as to what constitutes appropriate credit requirements, it has, in the context of all the circumstances of this case, assessed whether the requested financial assurances result in unacceptable outcomes.

It is the Board's view that a premium on uncommitted volumes is a reasonable approach to encourage a party to sign as a Committed Shipper and the Board has no concern with the 20 per cent premium as stipulated by the TSA. In the Board's view, this premium is not a risk compensation mechanism. With respect to the distribution of the net excess revenue arising from this premium, it is the Board's opinion that there may be circumstances where Enbridge's proposed revenue-sharing mechanism could be appropriate. However, given that there are only two shippers on Line 9 of which only one is a Committed Shipper, the Board finds that crediting the net excess revenue to one shipper rather than to the revenue requirement is unfair to NOVA Chemicals.

Given the applied-for revenue-sharing mechanism, the Board is of the view that Imperial is not likely to have to pay 100 per cent of the revenue requirement since NOVA Chemicals' primary means to source feedstock for its Corunna facility is Line 9. In all likelihood, there would be uncommitted volumes being transported on Line 9 by NOVA Chemicals that would reduce Imperial's effective transportation cost. The estimated $18.5 million of net excess revenue for 2008 is a clear demonstration that Imperial's effective transportation cost would be lower than 100 per cent of the revenue requirement.

Imperial, by being the only Committed Shipper and holding a majority of volume-weighted vote, can influence the timing of a potential re-reversal of Line 9. In the Board's view, this provision reduces the risk of Imperial paying a potential Termination Payment since, if Line 9 were to be re-reversed and the rate base was not rolled into Enbridge's Older System, Imperial could terminate the TSA and avoid any Termination Payment.

The Board is of the view that the TSA is highly beneficial to Imperial while being unduly discriminatory to NOVA Chemicals because Imperial would receive all the benefits of the revenue-sharing mechanism while NOVA Chemicals' access to Committed Shipper status would be restrained by the imposition of unreasonable financial assurances. In the Board's view, these trade-offs are highly advantageous to Imperial without materially increasing its risk and effectively placing NOVA Chemicals at a competitive disadvantage vis-à-vis Imperial since both parties compete in the same market. In the Board's view, the fact that only Imperial negotiated with Enbridge to structure the TSA could give rise to the perception that one or both negotiating parties may have made inappropriate use of influence in the negotiating process.

As a result, the Board finds that the applied-for toll design and resulting financial assurances is a negotiated solution between Enbridge and Imperial that comes at an unreasonable cost to a third party, in this case, NOVA Chemicals. The Board finds that it would be contrary to the public interest to unduly restrain NOVA Chemicals from access to Committed Shipper status by approving a toll design that generates the need for financial assurances of the nature that was requested by Enbridge.

The Board notes that if an agreement with respect to financial assurances had been reached between all parties, the Board would not have taken issue with the TSA.

Based on the above discussion related to the trade-offs between Enbridge and Imperial which resulted in the TSA, the Board is of the view that the TSA is structured in such a way that the terms of service under this agreement would be unduly discriminatory to NOVA Chemicals. The Board therefore finds, in these circumstances, that the TSA is unacceptable.

Decision

The Board denies Enbridge's application for approval of the Line 9 Toll Principles as prescribed by the TSA, and the resulting tolls.

Chapter 4

Exemptions

Enbridge requested exemption from the Filing Requirements as identified in Guide BB "Financial Surveillance Reports (Toll Information Regulations" of the Board's *Filing Manual* and from the requirements to keep a system of accounts in the manner prescribed by the *Oil Pipeline Uniform Accounting Regulations* (OPUAR).

Enbridge stated that a commercial arrangement where there is no cost-of-service revenue requirement does not lend itself to the types of schedules identified in Guide BB. Instead, Enbridge filed illustrative schedules which it submitted would be sufficient to monitor actual performance and proposed to file annually the following: prior year tolls, prior year notional revenue requirement and net income, prior year provision for income taxes, current year toll adjustment factor and current year tolls.

Enbridge requested exemption from the OPUAR because, while it does keep a mapping of its chart of accounts to the NEB accounts, it does not keep its general ledger according to the prescribed system of accounts. Instead the general ledger is kept according to Enbridge's own chart of accounts.

No party expressed any concern with these requests.

Views of the Board

The Board is of the view that the requested exemptions are reasonable given that there is no cost-of-service revenue requirement. Had the Board not denied the TSA, Enbridge would have been relieved from the requirements to comply with the reporting and filing requirements set forth in the Board's Filing Manual, Guide BB entitled Financial Surveillance Reports, but would have been required to file in lieu, on an annual basis, all information it has committed to file. Further, Enbridge would have been relieved from the requirements to keep a system of accounts in a manner prescribed by the OPUAR.

Chapter 5

Disposition

The foregoing constitutes the Board's Reasons for Decision in respect of the Application considered in the RH-3-2008 proceeding.

G Habib

G.A. Habib
Presiding Member

R.R. George
Member

K.M. Bateman
Member

Calgary, Alberta
Month 2009

Appendix I

List of Issues

The Board has identified but does not limit itself to the following issues for discussion in the proceeding:

1. The appropriateness of Enbridge's open season for transportation service on Line 9;

2. The reasonableness of Enbridge's financial assurance requirements;

3. Whether the terms and conditions in Enbridge's Line 9 Tariff should address how Enbridge may exercise its discretion in requirements for financial assurance;

4. The appropriateness of the 20 per cent premium of uncommitted transportation service;

5. Whether it is just and reasonable that revenue from uncommitted shippers is credited to the revenue requirement; and

6. The appropriateness of Enbridge's request for exemption from the filing requirements as specified in the Board's *Filing Manual* at Guide BB and the *Oil Pipeline Uniform Accounting Regulations*.